

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE WAVE STUDIO, LLC,

Plaintiff,

v.

GENERAL HOTEL MANAGEMENT, LTD., 13 CV 9239 (CS)

MASTERCARD INTERNATIONAL, INC., 14 CV 8322 (CS)
VIRTUOSO, LTD.,

Defendants.

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U.S. Courthouse
White Plains, N.Y.
November 24, 2014
10:35 a.m.

Before: HON. CATHY SEIBEL,
United States District Judge

APPEARANCES

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Sue Ghorayeb, R.P.R., C.S.R.
Official Court Reporter

1 THE CLERK: The Wave Studio, LLC v. Mastercard
2 International, Inc.

3 THE COURT: And, Mr. Moar, why are you here?

4 MR. MOAR: I represent Setai Owners. They own the
5 hotel that's the subject of about half the photographs that
6 are at issue, and General Hotel Management was their agent.

7 THE COURT: The case is stayed as to you, is that
8 right?

9 MR. MOAR: That's correct, Your Honor, but we have
10 indemnification obligations for General Hotel Management.

11 THE COURT: Make yourself comfortable.

12 Mr. Toke.

13 MR. TOKE: Yes, yes.

14 THE COURT: I guess Mr. Benavides?

15 MR. BENAVIDES: Yes, this is he.

16 THE COURT: Okay. This is Judge Seibel.

17 MR. BENAVIDES: Yes.

18 THE COURT: I'm here in the courtroom. We are on
19 the record. I have a court reporter, so it is essential,
20 before either of you says a word, you say your last name. You
21 don't have to say, "this is Daniel Benavides," just say
22 "Benavides" and whatever you have to say, because otherwise
23 the court reporter is not going to know which of you is
24 speaking. And let me say -- make sure I know who is here in
25 the room.

1 Mr. Reuber is here representing the Plaintiff.

2 MR. REUBER: Good morning, Your Honor.

3 THE COURT: And Mr. Schwartz and Ms. Lamore are here
4 for General Hotel Management, as is Mr. Benavides, and Mr.
5 Moar is here for Setai. Do I have it right?

6 MR. MOAR: Yes, Your Honor.

7 THE COURT: And I left somebody out.

8 MR. KIMREY: Yes.

9 THE COURT: Mr. Kimrey is here for Mastercard.

10 MR. KIMREY: And Virtuoso.

11 THE COURT: And Virtuoso, okay. So, I guess my
12 first question, I'll ask Mr. Reuber because he is here: Why
13 did the Plaintiff bring this case in two parts?

14 MR. REUBER: Your Honor, it's because I have -- our
15 firm has a conflict with Mastercard. We were actually unaware
16 that the client was going to proceed against Mastercard until
17 after the fact, and I think Mr. Toke can answer any other
18 questions regarding -- because that's the extent of my
19 knowledge.

20 THE COURT: You need to talk a lot louder and into
21 the mic, so that the folks on the phone can hear you.

22 MR. REUBER: I'm sorry, Your Honor.

23 THE COURT: Do you want to say that again?

24 MR. REUBER: Yes. We were unaware that the client,
25 Wave Studio, was going to proceed against Mastercard. We have

1 a conflict because we represent Mastercard in trademark
2 matters.

3 THE COURT: So, what's the plan going forward?

4 MR. REUBER: Mr. Toke can answer that question. I
5 have not had any discussions regarding the case once it was
6 transferred from California.

7 THE COURT: Well, it just seems kind of silly to not
8 consolidate the cases because that then creates a conflict.

9 Mr. Toke, do you know what your client's preference
10 is?

11 MR. TOKE: Our preference is not to consolidate the
12 cases, Your Honor, because we do not actually name GHM as a
13 defendant in the California case, because Plaintiff has no
14 evidence connecting GHM to the infringement involved with, I
15 guess, Virtuoso and Mastercard.

16 I will, I will represent that counsel for Virtuoso
17 and Mastercard has indicated to us that such evidence exists,
18 we have yet to see anything, and we have no evidence to
19 suggest that there is actually any link between GHM and
20 Mastercard, Virtuoso for the purposes of the infringement. As
21 a result, we don't see any, any basis for consolidation.

22 THE COURT: Mr. Kimrey is dying to say something.

23 MR. KIMREY: Your Honor, we just heard counsel, Mr.
24 Reuber, say that the only reason this case wasn't brought, the
25 California case, before you is because his firm has a conflict

1 against Mastercard. So, this case actually presumably would
2 have been brought here had that conflict not existed.

3 I have actually never seen a case that is more
4 appropriate for consolidation than this case. If you look at
5 Judge Seeborg's transfer order, you can see some of the
6 reasons why the cases should be consolidated, although, you
7 know, admittedly, forum non conveniens transfer standards
8 aren't on all fours with the consolidation standards.

9 Under Civil Rule of Procedure 42(a), this Court has
10 discretion to consolidate the matters if they have common law
11 or common facts. Here, the photos that are at issue in what
12 was formerly the California case are at issue in the original
13 case. The registrations that are at issue in what was the
14 California case are at issue in the original case. The
15 witnesses will be the same. The deposition testimony will be
16 the same. The documentary evidence will be the same.

17 And, incidentally, up until just now, I wasn't even
18 aware that Mr. Reuber's firm was not representing The Wave
19 Studio in my case because of a conflict with Mastercard, and
20 we've spent considerable money litigating transfer from
21 California to this jurisdiction solely because of a conflict
22 that existed.

23 It seems to me that the more appropriate and
24 efficient course would have been for other counsel, without a
25 conflict, to enter his or her appearance before this Court and

1 sue us here as opposed to making us go through the unnecessary
2 and inefficient exercise of seeking transfer and then seeking
3 relatedness, and now seeking consolidation. And we would like
4 to be under the stay that all of the other Defendants are
5 under other than GHM, including the discovery stay and the
6 stay related to any pleadings that should be filed.

7 THE COURT: Well, let me say a couple of things. If
8 I heard Mr. Reuber correctly, the conflict arises because his
9 firm represents Mastercard in trademark litigation. So, if
10 Mastercard is unhappy with Mr. Reuber's firm, they can express
11 it. I'm not going to get into it. You can pick up and take
12 your business elsewhere if you don't like it.

13 Mr. Toke is of the view, apparently, that as far as
14 he can tell, this case shouldn't fall within the stay of
15 General Hotel Management, because as far as he can tell,
16 whatever Mastercard and Virtuoso did has nothing to do with
17 General Hotel Management. So, why should the stay apply?

18 MR. KIMREY: The only reason Mr. Toke is saying that
19 is because we have no discovery in the California litigation;
20 all we have done is litigate the transfer issue.

21 The photos at issue in the California litigation and
22 the New York litigation were all obtained by GHM via license
23 from The Wave Studio, from Junior Lee, who is the principal of
24 The Wave Studio, and then those photos were provided to the
25 various hotels that have been sued in this action, including

1 but not limited to the Setai Miami. The Setai Miami is one of
2 the hotels that incidentally is at issue in what was formerly
3 the California case.

4 So, Virtuoso obtained the photos via the hotels that
5 obtained the photos from GHM, which obtained the photos from
6 The Wave Studio or Junior Lee.

7 THE COURT: And what is Virtuoso?

8 MR. KIMREY: Virtuoso is a travel agency.

9 THE COURT: It's somehow related to Mastercard?

10 MR. KIMREY: Virtuoso had an agreement with
11 Mastercard to provide discounts to Mastercard users. In
12 conjunction with that agreement, Virtuoso gave access to
13 photos on the Mastercard website. So that's why Mastercard
14 was originally sued in the California case. Somehow it was
15 discovered that Virtuoso had provided those photos to
16 Mastercard. So, Virtuoso was then named as a co-defendant in
17 the First Amended Complaint in California.

18 THE COURT: So, Mr. Toke, isn't it fair to say that
19 General Hotel Management is the chokepoint here; that to the
20 extent these pictures went beyond General Hotel Management to
21 the whole world, including the, you know, dozens of people you
22 have sued, it all went through General Hotel Management?

23 MR. TOKE: Right. So, we have no indication that
24 that's actually true other than the representation from
25 opposing counsel that it may be true. We've -- we actually

1 asked for the documents admittedly outside of discovery, but
2 for the purposes of determining whether or not there is a
3 connection, and we haven't received anything of that sort.

4 We do not have any evidence that that actually
5 happened. These, these photographs are certainly available on
6 the Internet and it wouldn't be the first time that a party
7 pulled something off of the Internet without authorization.

8 So, without evidence that establishes that
9 connection between GHM as the source point, The Wave Studio
10 has no basis. We have done investigation as much as we can
11 and haven't been able to make that connection. So, as far as
12 we are concerned, we have yet to see anything that actually
13 would establish what Mr. Kimrey is representing.

14 THE COURT: Well, I guess --

15 MR. TOKE: As a --

16 THE COURT: Go ahead. I'm sorry.

17 MR. TOKE: You know, as a result, we, we do not
18 believe that consolidation is appropriate and certainly not a
19 stay, as we are trying to understand the connections here.

20 THE COURT: So, it seems like we can do one of two
21 things. We could have a motion from Mr. Kimrey in which he
22 would have to put his cards on the table and provide the
23 evidence showing that his clients got these photographs
24 through the same means as all of the other stayed parties or
25 he could do that informally.

1 Is there a reason, Mr. Kimrey, why you wouldn't want
2 to save the trees and just try to convince Mr. Toke through
3 whatever documents or witnesses you would use in a motion?

4 MR. KIMREY: We certainly --

5 THE COURT: Or do you want to go through the
6 formality of a motion?

7 MR. KIMREY: No. We have been reluctant to provide
8 the information to Mr. Toke because we have seen the
9 California litigation from its inception as an end-run around
10 this stay; an effort to take discovery where it has been
11 stayed here, identify additional targets and sue them. So, we
12 were reluctant to tacitly approve of that maneuver by giving
13 discovery when a stay existed here. However, we can certainly
14 provide Mr. Toke with that evidence if it's essential to get
15 consolidation.

16 THE COURT: Well, it sounds like your other option
17 is to make a motion, and if you didn't provide the details in
18 connection with the motion, Mr. Toke would say what he just
19 said here, which is, "how do we know you didn't download them
20 off the Internet," and that would be a good question. If you
21 downloaded them off the Internet, it would be a very different
22 case, so.

23 MR. KIMREY: The Complaint in the original case,
24 Your Honor, asserts that Junior Lee provided the photos only
25 to GHM.

1 THE COURT: But then GHM provided them to dozens of
2 people and they were out there.

3 I'm not doubting you. I'm just saying, you're going
4 to have to persuade either Mr. -- well, let me ask Mr. Toke a
5 hypothetical. If Mr. Kimrey provided you with the evidence
6 you have been asking for and convinced you that indeed his
7 client has got these photos via Setai, which got them via GHM,
8 would you still be opposing consolidation?

9 MR. TOKE: Well, it depends, Your Honor. Of course,
10 we don't know -- first, the photographs at issue weren't just
11 the Setai. So, it would really depend on the evidence itself.

12 We would certainly be much more inclined to agree to
13 the consolidation if there were evidence showing a clean link
14 between GHM and Virtuoso with the photographs, yes. But
15 because the photographs at issue in the California case do not
16 overlap perfectly with the photographs in the New York, the
17 current New York case against GHM, I can't say that
18 unequivocally, but certainly, if there is some link, we would
19 be far more inclined to agree to consolidation.

20 MR. KIMREY: Your Honor, I just --

21 THE COURT: So, it sounds like Mr. Toke is going to
22 be reasonable. If you show him that you are in the same boat
23 as all of the parties that were stayed, it sounds like he is
24 not going to dispute that you are in the same boat as all of
25 the parties that were stayed, but I don't blame him for, you

1 know, not assuming things.

2 MR. KIMREY: Your Honor, there is a -- Mr. Toke
3 misspoke. The photos at issue in California or what was the
4 California case, there are at least 11 of them that are at
5 issue in this case. He had said --

6 THE COURT: He said there is overlap but they don't
7 overlap entirely.

8 MR. KIMREY: We can try to work it out with Mr.
9 Toke. If past results are indicative of future returns, I'm
10 frankly skeptical, but we will give it a shot. In the
11 meantime, could the case be stayed against us with respect to
12 both pleading and discovery?

13 THE COURT: Well, I think the -- you know, that
14 issue needs to be -- obviously, if I'm going to end up
15 staying, it would be sort of -- it would defeat the purpose to
16 require you to dive into discovery now. On the other hand, I
17 wouldn't want this to drag out.

18 What I would like to do is set a schedule, which
19 would give you two a window for informal discussions, but then
20 a date by which, Mr. Kimrey, you'll make a motion. And then
21 we will have you brief it fairly quickly, and, you know, I
22 would jump the line with it and give you a bench ruling,
23 because if, if it ends up that you make a motion and Mr. Toke
24 convinces me that you shouldn't be stayed along with everyone
25 else, then I'll want to get going.

1 MR. KIMREY: Your Honor.

2 THE COURT: And if, if the outcome is you do belong
3 with everyone else, then no harm no foul.

4 So, what's a reasonable period, Mr. Kimrey, for you
5 to get your ducks in a row to show everything to Mr. Toke that
6 you would like to show him informally to convince him of the
7 ripeness of your position?

8 MR. KIMREY: A week from Friday.

9 THE COURT: Okay. So, today is the 24th. A week
10 from Friday is December 5th.

11 So, by December 5th, Mr. Kimrey will provide
12 whatever information he has got to Mr. Toke. Mr. Toke is
13 going to want to consider that.

14 Mr. Toke, is it reasonable that you will get back to
15 Mr. Kimrey by the 19th as to whether you'll consent?

16 MR. TOKE: Yes, Your Honor, that's reasonable.

17 THE COURT: All right. If there is no consent to
18 the consolidation and stay, Mr. Kimrey will have to make a
19 motion. When could you do that without ruining your holidays?

20 MR. KIMREY: Mid-January.

21 THE COURT: January 15th?

22 MR. KIMREY: Sure.

23 THE COURT: And how long would you like to oppose,
24 Mr. Toke, if he makes his motion by January 15th?

25 MR. TOKE: Well, let's say ten days.

1 THE COURT: Very efficient. That will take you to
2 the 25th. Let's make it the 26th, because the 25th is a
3 Sunday. And reply in a week, Mr. Kimrey?

4 MR. KIMREY: Yes.

5 THE COURT: February 2nd.

6 And let me ask Ms. Cama for a date for me to give
7 these folks a bench ruling. I'm away the week of the ninth,
8 so let's make it -- and we have a trial the week of the 23rd.
9 So, let's try to make it the 18th or 19th? Do we have
10 anything in there?

11 THE CLERK: February 19th.

12 THE COURT: February 19th at?

13 THE CLERK: 9:30 a.m.

14 THE COURT: 9:30 a.m.

15 MR. KIMREY: Your Honor, I do have one concern, and
16 maybe that's going to change now that new counsel appears to
17 be appearing for GHM. But discovery cutoff right now, in the
18 original case, I think is December 31st as to the limited
19 issues as to GHM.

20 We have been unable to get access to the discovery
21 that's occurring in the original case, because we haven't been
22 a party in the original case, and I was interested in
23 potentially accelerating our becoming a party, so we could see
24 what's going on in the original case, because that original
25 case is dispositive as to issues in our case.

1 So, in the alternative, we would, just to accelerate
2 things, if the schedule stays the same, be willing to get a
3 motion on file much faster on consolidation, so that we could
4 become a party and get access to the discovery that's
5 occurring in the original case.

6 THE COURT: Well, I mean, it doesn't really -- I
7 just want to understand why that's so important.

8 If you get what you want, that's going to be
9 bubbling along, and if General Hotel Management carries the
10 day, you are off the hook, and if it doesn't, then you will
11 have an opportunity to play ball.

12 MR. KIMREY: Well, we theoretically could influence
13 the trajectory with respect to GHM.

14 There's also a fairly twisted defense and indemnity
15 matrix that exists in the background. That I don't think is
16 going to be put before you to decide, because it's not
17 relevant to the underlying issues of copyright infringement,
18 but it is relevant to the issues of who is paying for what.
19 And the sooner we can see what's going on in the original
20 case, the sooner we can take certain steps that would affect
21 who is paying for what as to Virtuoso and Mastercard.

22 THE COURT: And why can't your co- -- your perhaps
23 future co-defendants just tell you what's going on?

24 MR. KIMREY: We have received indication, and that's
25 a passive voice, that they won't show us everything we want to

1 see, and if we were a party, we would have a right to see it.
2 And I could issue discovery out of one case into the other,
3 but that's the kind of inefficiency we are trying to avoid by
4 transferring, showing relatedness, and seeking consolidation.

5 THE COURT: Well, if you want to make the motion
6 sooner, and that's fine with me, but then -- that's fine.

7 If you don't have it worked out by December 19 --
8 well, let me ask Mr. Schwartz as he is sitting here, and maybe
9 this is moot. What's the story with -- and I need you to come
10 stand by a microphone, so the folks on the phone can hear you.

11 What's the story with your firm and Mr. Benavides's
12 firm? Who is representing GHM?

13 MR. SCHWARTZ: Yes. We will be substituting in for
14 Mr. Benavides's firm, and as my predecessor was stating that
15 he was a little bit passive, let me be completely passive,
16 because I would prefer for Mr. Benavides to explain what has
17 happened in the past. I can only say that we are happy to
18 come in, we are coming in, and --

19 THE COURT: Well, are you in a position to finish
20 discovery on time, 12/31?

21 MR. SCHWARTZ: We had a discussion with Plaintiff's
22 counsel. Plaintiff's counsel said that his -- the answer to
23 that question is probably yes. I would have, I would have
24 hoped for a short extension, which I asked -- which we
25 discussed with Plaintiff's counsel. He said he had no

1 particular problem with that except his January is jammed up,
2 in that if he could -- I think we were discussing a thirty-day
3 extension. I don't, I don't want to misspeak, but I know we
4 did discuss that potentiality.

5 Myself and my firm have no desire to extend
6 discovery for a prolonged period of time, but a short period
7 is acceptable to us, and I think it was acceptable to
8 Plaintiff, but I don't want to speak for him.

9 THE COURT: Well, Mr. Benavides, anything you want
10 to add? What's going on with discovery?

11 MR. BENAVIDES: Well, Judge, we've, we've changed
12 the -- we have exchanged documents. We have exchanged
13 document requests and documents.

14 We have not reviewed the documents that we received.
15 We received several documents from Plaintiff. We have not
16 reviewed them yet because of the entry of new counsel. And,
17 so, we would, you know, begin reviewing those documents,
18 finalize that process, and then probably set depositions.

19 We have been attempting to schedule depositions with
20 Plaintiff's counsel for some time. We would like to set those
21 for January, if possible, but it sounds like his schedule is
22 booked up, and then I think we would be pretty much ready to
23 go on, on discovery.

24 THE COURT: How many depositions do you anticipate?

25 MR. BENAVIDES: We anticipate taking about maybe

1 three or four. I don't know what the Plaintiff wants to do.

2 THE COURT: Mr. Reuber, how many depositions are you
3 expecting?

4 MR. REUBER: At least two, possibly four.

5 THE COURT: So, it doesn't sound like there is any
6 way you are going to get that done by December 31st.

7 MR. BENAVIDES: No, that's the case.

8 THE COURT: Four weeks, including Christmas, to get
9 eight -- five to eight depositions done. Let's be realistic
10 here.

11 And, Mr. Reuber, you have got a problem in January?

12 MR. REUBER: Yes, Your Honor. I have a two-week
13 jury trial before Judge Briccetti, and then I've got at least
14 another week's work of depositions in a case before Judge
15 Sweet that he would like to see completed before February.

16 THE COURT: So, if I extend to the end of February,
17 you will have December and February to get this done.

18 All right. I'll extend discovery to March 2nd for
19 Plaintiff and GHM, in 13 CV 9239.

20 How does that affect your outlook on when you want
21 to make your motion, Mr. Kimrey?

22 MR. KIMREY: I want to do whatever you want me to
23 do, Your Honor, .

24 THE COURT: Well, I set the schedule, and then you
25 said you would like a tighter schedule perhaps, depending on

1 what was going on with the discovery in the original case.

2 So, I'm happy to set -- you know, right now, you've
3 got -- you're going to get an answer on December 19th whether
4 there is going to be consent. If there is not, then you are
5 taking four weeks to make the motion. If you want to take
6 less, that's fine. I'm indifferent.

7 MR. KIMREY: Do we need -- so, can we dispense with
8 the pre-motion letter requirement?

9 THE COURT: Yes.

10 MR. KIMREY: Okay.

11 THE COURT: Yes. We are talking about it now.

12 So, if Mr. Toke gets back to you on December 19th
13 and says, "I'm not consenting," right now the schedule calls
14 for you to make the motion by January 15th and it will be
15 briefed briskly, and you will have an answer February 19th.
16 If you want to move it up, I can move it up.

17 MR. KIMREY: Since we have gone through the exercise
18 of your setting the schedule, let's just stick with that.

19 THE COURT: Okay. And, in the meantime, the time to
20 answer for Mastercard and Virtuoso will be extended to a date
21 to be set when we meet on December 19th.

22 THE CLERK: February.

23 THE COURT: I'm sorry, February 19th. Thank you.

24 MR. TOKE: Your Honor, a question in terms of the
25 timing. If Mr. Kimrey does in fact file a motion, the

1 January 15th date that the Court just set --

2 THE COURT: Your date to oppose is still

3 January 26th, even if he wants to do it early, unless -- well,

4 in my experience, lawyers never do things early, but in the

5 unlikely event he does it early, unless he does it

6 significantly early, the rest of the schedule will remain the

7 same. If he does it two weeks early, then you two should talk

8 and try to work out a briefing schedule, and I can adjust the

9 date that I'm going to give you the bench ruling, but it

10 doesn't sound like he is planning to do earlier.

11 MR. TOKE: Very good, Your Honor.

12 THE COURT: All right. Anything more we should do

13 now?

14 MR. KIMREY: Your Honor, how should we convey if we

15 agree that the cases should be consolidated? Should we --

16 THE COURT: You can just send me a letter and --

17 with a proposed order and -- with a proposed order of

18 consolidation and a stay.

19 Did I -- I can't remember now whether the stayed
20 parties in the first case answered or not, but whatever they
21 did, you should do the same, if there is going to be a stay in
22 the second case.

23 MR. KIMREY: Your Honor, a couple of the parties
24 answered when they didn't realize there was a stay. I think
25 Delta answered and --

1 THE COURT: Okay. All right. So, if you agree that
2 there should be a stay, put in it that the time to answer is
3 also stayed.

4 MR. KIMREY: And the answer on that responsive
5 pleading deadline is continued.

6 THE COURT: Yes.

7 MR. KIMREY: All right.

8 THE COURT: If there is -- when I rule on December
9 19th either -- well, if I rule on February 19th that there is
10 not going to be a stay, we will set a time to answer. If
11 there is going to be a stay, you don't have to answer, and if
12 you agree on the stay, then you also don't have to answer.

13 Okay. Anything else?

14 All right. Thank you very much.

15 Can I just ask on the Plaintiff's side, is it --
16 well, I guess I should ask this again after we know whether
17 there is going to be a consolidation, but it just seems --
18 what's the right word -- cumbersome to have two different
19 Plaintiff's lawyers if we consolidate. So, I'll ask you again
20 later on what the Plaintiff's plans are.

21 MR. TOKE: Very good. Thank you, Your Honor.

22 THE COURT: All right. Thank you all. Sorry about
23 the difficulty. I think I accidentally hung up on you before
24 when I was trying to put you on speaker.

25 MR. TOKE: That's okay, Judge.

1 THE COURT: All right. Have a good holiday
2 **everyone.**

3 MR. BENAVIDES: Thank you, Your Honor.

4 MR. KIMREY: Thank you, Your Honor.

5 MR. SCHWARTZ: Thank you, Your Honor.

6 MR. REUBER: Thank you, Your Honor.

7 THE COURT: Have a good holiday **everyone.**

8 MR. KIMREY: You too.

9 (Case adjourned)

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